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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-13-0009
)
) COMMENT OF ARIZONA
Petition to Amend Rule 32.5, Arizona) ATTORNEYS FOR CRIMINAL
Rules of Criminal Procedure) JUSTICE REGARDING PETITION
) TO AMEND RULE 32.5, ARIZONA
) RULES OF CRIMINAL
) PROCEDURE
)
)

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition. AACJ is a not-for-profit membership organization representing four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature.

¶2 AACJ supports the proposed amendment of this rule for the same reasons stated in the rule change petition. Attorneys who represent petitioners in post-conviction relief proceedings are fully aware of their ethical requirements to

raise all meritorious claims known at the time, because any claims that are not timely raised will be precluded under Rule 32.2(a). Requiring the defendant to certify that all known claims have been raised, therefore, is redundant at best, and at worst it also wastes time and invades the attorney-client privilege. The petition alludes to ethical concerns but the specific ethical rules involved here are: E.R. 1.2 (“a lawyer shall abide by a client’s decisions concerning the objectives of representation); E.R. 1.6 (lawyer’s duty of confidentiality); and E.R. 3.1 (lawyer may not raise frivolous claims).

¶3 Undoubtedly the purpose of the requirement in Rule 32.5 for the defendant to personally certify that all known claims have been raised is to ensure that the defendant is aware of the preclusion rules as well and does not file a successive petition at a later date including claims that should have been raised in the first petition. While the ambition of the rule may be proper, the rule actually fails to achieve that goal.

¶4 First, as this Court is aware, countless prisoners who have already exhausted their claims raisable under Rule 32 continue to file several more petitions anyway, for lack of any other procedural mechanisms for raising claims. Division Two of the Court of Appeals grants review of almost all petitions for review filed pursuant to Rule 32.9(c) and issues a written decision in those cases,

and in such repetitive cases the court will routinely specify how many previous petitions had been filed and list the case numbers and decision dates.

¶5 Second, as the petition notes, there are circumstances where the defendant does not agree that counsel has raised all known issues, and the current rule does nothing to advise courts as to how to proceed in such a circumstance. In some circumstances, the trial court will allow the defendant to file a supplemental petition even if counsel filed a merits petition, but the court is not required to allow hybrid representation. *State v. Cornell*, 179 Ariz. 314, 325, 878 P.2d 1352, 1363 (1994). Hence, in the case of a trial court disallowing a defendant's supplemental petition adding the issues that counsel excluded for whatever reason, an appellate court is likely to consider the striking of the supplemental petition to be a proper exercise of the trial court's discretion, reserving a finding of abuse of discretion only for the most egregious cases where counsel was clearly ineffective for failing to raise the claim asserted by the client's supplemental petition. In the absence of any meaningful remedy mandated by rule, therefore, requiring a represented defendant to certify that counsel has raised all known claims for relief appears to be an exercise of form over substance.

¶6 Rule 32.5's requirement of the defendant's certification is a vestige of the pre-1992 version of the post-conviction scheme. According to those rules, Rule 32.2's preclusive effect extended only to claims "still raisable" in a direct appeal or

Rule 24 motion or “knowingly, voluntarily and intelligently not raised” previously. Furthermore, Rule 32.4 at that time did not provide for appointment of counsel, rather the defendant would already be required to file a petition pursuant to then-existing Rule 32.5(a) (in which he would certify having raised all known claims). Then, according to Rule 32.5(b), the defendant could request appointment of counsel, and if granted, appointed counsel would be permitted to “file an amended petition within 15 days of appointment.”

¶7 Since Rule 32 was substantially changed in 1992 and petitioners now are entitled to counsel *before* filing a petition, the requirement for the defendant to personally certify the completeness of counsel’s pleadings is an anachronism that needs to be removed. Notably, no comparable requirement exists in Rule 31 for appellants to personally certify the completeness of counsel’s work on direct appeal. Instead of serving any useful purpose, this anachronism has served to cause undue and unnecessary delay before trial judges consider the claims on the merits.

¶8 For these reasons, AACJ respectfully requests this Court grant the petition to amend Rule 32.5.

DATED: May 21, 2013.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/
David J. Euchner

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